

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLETE REO HART,

Plaintiff,

No. CIV S-05-0777 LKK PAN P

vs.

TERESA SCHWARTZ,
et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed June 16, 2005, plaintiff's amended complaint was dismissed with leave to file a second amended complaint. Plaintiff has now filed a second amended complaint.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

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1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 A complaint, or portion thereof, should only be dismissed for failure to state a
9 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set
10 of facts in support of the claim or claims that would entitle him to relief. Hishon v. King &
11 Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer
12 v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a
13 complaint under this standard, the court must accept as true the allegations of the complaint in
14 question, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the
15 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor,
16 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

17 The court finds the allegations in plaintiff's second amended complaint so vague
18 and conclusory that it is unable to determine whether the current action is frivolous or fails to
19 state a claim for relief. The court has determined that the second amended complaint does not
20 contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal
21 Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of
22 the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th
23 Cir. 1984). Plaintiff must allege with at least some degree of particularity overt acts which
24 defendants engaged in that support plaintiff's claim. Id. Because plaintiff has failed to comply
25 with the requirements of Fed. R. Civ. P. 8(a)(2), the second amended complaint must be
26 dismissed. The court will, however, grant leave to file a third amended complaint.

1 If plaintiff chooses to file a third amended complaint, plaintiff must demonstrate
2 how the conditions complained of have resulted in a deprivation of plaintiff's constitutional
3 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the third amended complaint
4 must allege in specific terms how each named defendant is involved. There can be no liability
5 under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's
6 actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto,
7 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).
8 Furthermore, vague and conclusory allegations of official participation in civil rights violations
9 are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

10 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
11 order to make plaintiff's third amended complaint complete. Local Rule 15-220 requires that an
12 amended complaint be complete in itself without reference to any prior pleading. This is
13 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
14 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a third amended complaint, the prior
15 pleadings no longer serve any function in the case. Therefore, in a third amended complaint, as
16 in any prior complaint, each claim and the involvement of each defendant must be sufficiently
17 alleged.

18 In accordance with the above, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff's second amended complaint filed June 23, 2005 is dismissed; and
20 2. Plaintiff is granted thirty days from the date of service of this order to file a
21 third amended complaint that complies with the requirements of the Civil Rights Act, the Federal
22 Rules of Civil Procedure, and the Local Rules of Practice; the third amended complaint must
23 bear the docket number assigned this case and must be labeled "Third Amended Complaint";
24 plaintiff must file an original and two copies of the third amended complaint; failure to file a

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1 third amended complaint in accordance with this order will result in a recommendation that this
2 action be dismissed.

3 DATED: April 18, 2006.

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6 UNITED STATES MAGISTRATE JUDGE

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